

This letter discusses nexus. See *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992). (This is a GIL.)

September 26, 2006

Dear Xxxxx:

This letter is in response to your letter dated July 3, 2006, in which you request information. The Department issues two types of letter rulings. Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at [www.ILTAX.com](http://www.ILTAX.com) to review regulations, letter rulings and other types of information relevant to your inquiry.

The nature of your inquiry and the information you have provided require that we respond with a GIL. In your letter you have stated and made inquiry as follows:

We are making final preparations to launch a new Internet-based enterprise and are seeking your assistance in determining how to comply with your state's sales tax regulations. The key issue we are struggling to resolve is whether we are required to collect sales tax for tangible property purchased by potential customers in your state. We're asking you to please review the information set forth below and issue a determination that we can follow.

The enterprise that we intend to establish will be a Limited Liability Company (LLC), organized in STATE, and with a registered agent and business address in STATE. All retail sales will be made via the Internet exclusively, using a web server located in STATES. A wholesale fulfillment supplier will drop-ship tangible goods via common carrier to customers that may be located in your state from one or more of its warehouses—the supplier has multiple warehouses in different states, and one warehouse is located in your state. This wholesale fulfillment supplier will invoice our STATE company on a non-taxable basis (as a reseller) at wholesale prices. Our company will bill customers for goods that we sell to them at retail prices.

The way the web-based business will function is as follows: The customer locates our company's website on the Internet, browses the site and selects items to purchase from us. To complete the purchase, our customer submits credit card information to us online. Once our customer's credit card is validated, we purchase the ordered items

from our supplier, who fulfills the order on behalf of our company, and who ships the order to our retail customer via common carrier. The wholesale supplier invoices our STATE LLC at wholesale for goods fulfilled but our customers will only deal with our company, since we are the retailer selling goods to them (our supplier will not sell goods directly to our customers). Goods purchased may not be returned to the warehouse in your state. There is no common ownership between our entity and the wholesale fulfillment company, and the only presence in your state is the fulfillment warehouse (our STATE company will not have an office, employees, agents, representatives, affiliates, etc., in your state).

Based on the foregoing, we're seeking guidance on how to proceed. If your determination is that we are required to collect and remit sales tax for sales to our customers located in your state, then we will need your advice regarding what type of permit to secure, what form(s) to submit, and the proper sales tax rate to collect and remit. In addition, we would like to verify whether shipping alone—or shipping and handling together—is taxable, which will be a completely separate line item on the invoice.

Thank you for your time and assistance in this matter.

## **DEPARTMENT'S RESPONSE**

Determinations regarding nexus are very fact specific and cannot be addressed in the context of a General Information Letter. However, we can provide you with basic guidelines that may be used to determine whether a seller would be considered "an Illinois retailer" subject to Retailers' Occupation Tax liability or "a retailer maintaining a place of business in Illinois" subject to Use Tax collection duties from their Illinois customers.

An "Illinois Retailer" is one who either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois Retailer is then liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by the purchasers.

Another type of retailer is the retailer maintaining a place of business in Illinois. The definition of a "retailer maintaining a place of business in Illinois" is described in 86 Ill. Adm. Code 150.201(i), enclosed. This type of retailer is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801, enclosed. The retailer must collect and remit Use Tax to the State on behalf of the retailer's Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The United States Supreme Court in *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state's tax law. The Supreme Court has set out a 2-prong test for nexus. The first prong is whether the Due Process Clause is satisfied. Due process will be satisfied if the person or entity purposely avails itself or himself of the benefits of an economic market in a forum state. *Quill* at 1910.

The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause. A physical presence is not limited to an office or other physical building. Under Illinois law, it also includes the presence of any agent or representative of

the seller. The representative need not be a sales representative. Any type of physical presence in the State of Illinois, including the vendor's delivery and installation of his product on a repetitive basis, will trigger Use Tax collection responsibilities. Please refer to *Brown's Furniture, Inc. v. Zehnder*, 171 Ill.2d 410 (1996).

The final type of retailer is the out-of-State retailer that does not have sufficient nexus with Illinois to be required to submit to Illinois tax laws. A retailer in this situation does not incur Retailers' Occupation Tax on sales into Illinois and is not required to collect Use Tax on behalf of its Illinois customers. However, the retailer's Illinois customers will still incur Use Tax on the purchase of the out-of-State goods and have a duty to self-assess their Use Tax liability and the customer must remit the amount directly to the State. The Use Tax rate is 6.25%.

In general, the imposition of the various local sales taxes in Illinois takes effect when "selling" occurs in a jurisdiction imposing a tax. The Department's opinion is that the most important element of selling is the seller's acceptance of the purchase order. Consequently, if a purchase order is accepted in a jurisdiction that imposes a local tax, that tax will be incurred. See 86 Ill. Adm. Code 270.115(b), enclosed. The tax rate is fixed by the location of the seller, not the delivery location. The fact that the item being sold is shipped from out-of-State or from another Illinois location is immaterial for purposes of local taxes if the sale occurs through order acceptance in an Illinois jurisdiction imposing a local tax. For these transactions the local tax will be incurred.

If a purchase order is accepted outside the State, but the property being sold is located in an inventory of the retailer which is located in an Illinois jurisdiction that has imposed a local tax (see, for example, Section 270.115(b)(3)), then the location of the property at the time of sale will determine where the seller is engaged in business for the purpose of determining the imposition of applicable local sales taxes. In situations in which the retailer has nexus, but both the purchase order acceptance and the location of the property being purchased are outside of the State of Illinois, such sales would only be subject to the Illinois Use Tax at the rate of 6.25%.

Although the regulation cited above (86 Ill. Adm. Code 270.115) deals with the municipal home rule taxes, the principles outlined in this regulation apply to all local taxes administered by the Department.

The Department's business registration form is the REG-1, "Illinois Business Registration Application." This form is available on the Department's website.

For information regarding drop shipments, see the Department's regulation "Drop Shipments" at 86 Ill. Adm. Code 130.225.

If you require additional information, please visit our website at [www.ILTAX.com](http://www.ILTAX.com) or contact the Department's Taxpayer Information Division at (217) 782-3336. If you are not under audit and you wish to obtain a binding PLR regarding your factual situation, please submit a request conforming to the requirements of 2 Ill. Adm. Code 1200.110 (b).

Very truly yours,

Martha P. Mote  
Associate Counsel

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